allowed to require passengers to produce their tickets out of mere wantonness, and when he has no doubt they have them. It may be said this must be done or else others will feel aggrieved, when required to produce their tickets. Reasonable persons would never feel so, if *bonâ fide* dealt with in the matter. And if the passenger has the ticket present, it is no hardship to produce it. But if he happens to have left it at home or mislaid it for the moment, it requires some consideration how far the rule is to be enforced out of mere wantonness, when the passenger has paid his fare, and this is well known to the conductor. If the passenger stipulates in the purchase of a commutation ticket, to pay another fare unless he produce his ticket, as in *Downs* v. *N. Y. & N. H. Railroad*, 36 Conn. 287, he should be bound by the contract. But upon the mere force of a rule of the company to require the passengers to produce their tickets when so requested by the conductor, it seems to admit of some doubt, whether the penalty of paying double fare should be enforced, when the facts show that the passenger did all in his power to comply with the rule, and that the company suffered no detriment. The reason for the rule failing the rule itself ought to fail, upon the well known maxim, *cessante ratione cessat et lex*. It would rather seem that a rule of this kind enforcing the penalty in such a case as the present ought to be held unreasonable and therefore void to that extent. But we know that rules, to be of much value, require strict enforcement. And, where the ticket might be used by any one, the conductor might be justified in requiring its production, in order to secure the company against redeeming it again. I. F. R.

Supreme Judicial Court of New Hampshire.

ADAMS *v.* ADAMS.

Courts have power to set aside or vacate decrees of divorce for fraud or imposition, as in the case of other judgments, and will exercise that power where such fraud or imposition is clearly established.

THIS was a motion by Melinda Adams to set aside a decree of divorce granted in this county (Hillsborough), December Term 1864.

The libellee offered to show that the divorce was obtained without notice to her, and by fraud and perjury; that the libellant, George W. Adams, knew her residence at the time, and caused the order of notice to be published in a newspaper that he had every reason to believe neither she nor her friends would see, for the purpose of concealing from her any notice of the proceedings; that this motion was made at the first term of the court after she was informed that the divorce had been granted.

The libellee also offered to prove that the libellant had not remarried since the decree of divorce was granted.

The court, *pro forma*, ruled that the evidence was not competent, and could not be considered; to which the libellee excepted.

The case was reserved.

Geo. Y. Sawyer & Sawyer, Jr., and *Isaac W. Smith*, for the libellant.—The decree of divorce in this case at the Dec. Term 1864, is a judgment as conclusive between the parties as a common-law judgment. It determined the *status* of the parties as to their matrimonial relations, and judicially declared them to be no longer husband and wife. It is now sought, after the lapse of seven years, to obtain a rehearing for the purpose of having their *status* during these seven years, and now judicially declared to be that of persons married to each other instead of divorced from each other. No rule or principle of law authorizes such a rehearing subsequent to the term of court at which the cause was finally adjudicated: *Greene* v. *Greene*, 2 Gray 361; *Parish* v. *Parish*, 9 Ohio St. 534.

Lord & Sulloway, *Morrison & Stanley* and *B. P. Cilley*, for libellee.

BELLOWS, C. J.—As a general proposition, courts have power to set aside, vacate, modify or annul their judgments for good cause shown: *Judge of Probate* v. *Webster*, 46 N. H. 518; *Bellows* v. *Stone*, 14 Id. 203; *Frink* v. *Frink*, 43 Id. 508; *Wiggin* v. *Veasey*, 43 Id. 513, and cases cited, and *Chamberlain* v. *Crane*, 4 Id. 115.

In this respect decrees in divorce suits stand upon the same footing as other judgments, both upon principle and authority. Bishop, in his work on Marriage and Divorce, 1st ed., § 697, lays it down as a general proposition, that the American tribunals, when unencumbered by specific statutory directions, have been governed by substantially the same principles in divorce causes as in others, in respect to opening decrees, or granting rehearings, writs of error, or *certiorari* or otherwise, according to the practice of the court, re-examining the question, except that there has always been a manifest reluctance to disturb a final judgment of divorce, especially after a second marriage involving the interests of third persons; for which he cites authorities from Ohio, New York, Kentucky and Delaware. So is 1 Phillipps's Ev. 341. The

same doctrine is laid down in a later edition by the same author: 2 Bish. on Mar. and Div., § 751.

It is equally well settled that judgments may be set aside or vacated when procured by fraud, but not on the application of a person who is himself a party to the fraud, nor will the judgment be avoided for fraud when the same question of fraud was tried in the original action. This doctrine is fully sustained by the case of *Tebbetts* v. *Tilton*, 31 N. H. 287, and cases cited; and in that case the subject was carefully considered.

So it is well settled that a judgment may be vacated, or the record of it amended, on the ground that it was entered up by mistake: *Bellows* v. *Stone*, 14 N. H. 203; and in this case the application to set it aside was made more than eleven years after the judgment was rendered. This was a bill in equity; and although it was held that courts of equity will set aside judgments at law when obtained by fraud, it would not do so for any error in the proceedings, but leave the party to his petition in the court of law: *Chamberlain* v. *Crane*, 4 N. H. 115; *Wiggin* v. *Veasey*, 43 Id. 313, and *Frink* v. *Frink*, Id. 508, are cases where mistakes in entering up judgments were corrected many years after the judgments were rendered.

Much more should judgments be corrected or vacated when they have been obtained by the fraud of one party, and the other is in no way implicated in it. The authorities, indeed, to this point are numerous and quite satisfactory in other jurisdictions. Among them are *Fermor's Case*, 3 Co. 77, 78 a; Story on Confl. of Laws, § 597; Starkie's Ev., pt. 2, §§ 77 and 83; *Duchess of Kingston's Case*, 11 State Trials 261; 1 Phillipps's Ev. 341; 2 Kent's Com. 655. In *Fermor's Case* it is laid down that the law so abhors fraud and covin that all acts, as well judicial as others, which of themselves are just and lawful, yet, being mixed with fraud and deceit, are in judgment of law wrongful and unlawful.

In *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumn. 600, STORY, J., p. 604, says: "I know of no case where fraud, if established by competent proofs, is not sufficient to overthrow any judgment or decree, however solemn may be its form and promulgation." The case there was a decree of a foreign court *in rem*, which in general was held to be conclusive. So in *Harding & Wife* v. *Alden*, 9 Greenl. 151, the general doctrine is recognised that "fraud and

collusion, when pleaded and verified, vacate all judgments and decrees." So is Broom's Legal Maxims *254, and cases cited.

As to the mode of avoiding a judgment or decree obtained by fraud, there is some diversity in the decisions, although it is generally held that such judgment or decree cannot be collaterally attacked by either party to it, but can be avoided only by proceedings instituted directly for that purpose. In some cases, however, a bill in equity to restrain the enforcement of such judgment or decree has been sustained, as in *Huggins* v. *King*, 3 Barb. S. C. 616, where a party had a good defence to a suit at law, but was prevented setting it up by the gross fraud of the plaintiff and others.

A similar doctrine was held in this state in *Hibbard* v. *Eastman*, 47 N. H. 507, and cases cited; so is 2 Kent's Com. 655, and so is *Vanmeter* v. *Jones*, 2 Green Ch. N. J. 520. These cases clearly recognise the doctrine that the party, injured by a judgment obtained by fraud, may in some form avoid the effect of it. The general doctrine is also recognised in *Great Falls Manf'g. Co.* v. *Worster*, 45 N. H. 110.

It has been said that neither a party to a judgment nor a privy can impeach it for fraud: 3 Cow. & Hill's Phillipps's Ev., note 610; but this doctrine was considered in *Tebbetts* v. *Tilton*, 31 N. H. 28, and repudiated, and for reasons that are entirely satisfactory to us. If the position had been taken that such judgment could not be collaterally impeached by a party or privy, it would be supported by the authorities; and from the reference in the note to *Davy* v. *Haddon*, 3 Doug. 310, and the notes to that case which hold that a party must apply to the tribunal which rendered the judgment to vacate it, it is not certain that anything more was meant by the learned editors.

This doctrine, in regard to impeaching judgments and decrees for fraud, has been applied in numerous cases to decrees in divorce suits and suits for nullity of marriage, and the weight of authority is greatly in favor of such application. Upon principle, there is no solid ground for any distinction between decrees in divorce suits and other judgments; or if there be any, it is to be found in the much greater danger of fraud and imposition in divorce cases as compared with others; thus adding largely to the necessity and importance of preserving the power to correct or vacate decrees that have been obtained by fraud and imposition.

Accordingly it is laid down in Bishop on Mar. and Div., § 699, that if a tribunal has been imposed upon, and in consequence of the fraud a judgment of divorce has been wrongfully rendered, it may vacate this judgment, when, upon a summary proceeding, it is made cognisant of the fraud: and see Id., § 706, note 4, and cases cited and also Id. 697. This is the doctrine of *Allen* v. *Maclellan*, 12 Penna. St. 328 (2 Jones), and of *Dunn* v. *Dunn*, 4 Paige Ch. 425.

In Story on Conflict of Laws, § 597, it is said, speaking of foreign sentences of divorce, that "fraud in this, as in other cases, will vitiate any judgment, however well founded in point of jurisdiction." So is 2 Kent's Com. *109. So in *Roach* v. *Garvan*, 1 Ves. Sen. 157, and *Brownsword* v. *Edwards*, 2 Ves. Sen. 243–246, it is held that a sentence in divorce cases may be impeached for fraud. So in *Harrison* v. *South Hampton*, 22 L. J. Rep, N. S. Chan. 372, it was distinctly held that a sentence of an ecclesiastical court, pronouncing a marriage to be a nullity because one of the parties was within the age of consent, and consent not given, would be itself a nullity when obtained by collusion.

So the doctrine that a decree of divorce may be impeached for fraud is recognised in *Borden* v. *Fitch*, 15 Johns. 121; *Harding* v. *Alden*, 9 Greenl. 151, and *Kerr* v. *Kerr*, 41 N. Y. 272.

The counsel for the libellee have cited the cases of *Greene* v. *Greene*, 2 Gray 361, and *Parish* v. *Parish*, 9 Ohio St. 534. But the case of *Greene* v. *Greene* merely decides that on an original bill filed at a subsequent term a decree of divorce will not be set aside for fraud and false testimony, and distinctly declines to give an opinion on the point whether such decree is open to any revisal by review, writ of error, *certiorari*, or any other proceeding in the nature of an appeal, the court taking the ground that such decree, when the court has jurisdiction, is conclusive between the parties, unless revised on some legal proceeding instituted directly for that purpose, although third persons might be allowed to attack it collaterally. And besides, it would seem that *Greene* v. *Greene* has been overruled in Massachusetts in *Edson* v. *Edson*, referred to in Bennett & Holland's Mass. Dig., vol. 3, p. 233.

The case of *Homer* v. *Fish*, 1 Pick. 435, was cited and relied upon. In that case, a suit was brought to recover back a sum of money paid by the plaintiff to satisfy a judgment recovered on

a policy of insurance, upon the ground that the judgment was obtained by fraud; but the court held that the judgment, so long as it was unreversed, was a bar to the recovery; and the court cites with approval the decision of the court in *Peck* v. *Woodbridge*, 3 Day 36, that a man cannot collaterally impeach or call in question a judgment of a court of law or decree in equity to which he is a party. It can only be done directly, by writ of error, petition for new trial, or bill in chancery.

These cases lend no aid to the position that a party to a decree of divorce cannot, in any form, impeach it for fraud.

The Ohio case of *Parish* v. *Parish* was an original bill in equity to set aside a decree of divorce, on the ground that it was obtained by fraud and perjury, and alleging also that the libellant had suppressed the paper which contained notice of the suit.

A demurrer to the bill was sustained, and the reasoning goes to the extent of holding that the decree was absolutely conclusive, and not subject to be impeached, even for fraud. Some stress was placed upon their statute, which provided that such decree should be final and conclusive,—the court holding it, however, to be in accordance with general policy. The result in this case is like that in *Greene* v. *Greene*, 2 Gray 361, but, unlike that case, it does not apparently leave open the question whether in some form, by review or other proceeding brought directly to reverse the decree, it ought not to be done.

To the reasoning in this case we cannot subscribe; and we think it is opposed both to principle and authority. It is essential, indeed, to the due administration of justice, that courts should have the power to protect themselves and their suitors against fraud and imposition.

Of course this power will always be exercised with great caution, and especially after a long lapse of time, and after changes in the *status* of persons upon the faith of decrees in cases like this.

In the case before us, the libellee offers to prove that she had no notice of the pendency of the suit, and that the libellant, knowing her residence, caused the notice to be published in a newspaper that he had every reason to believe neither she nor her friends would see, for the purpose of concealing from her any notice of the proceedings, and that the divorce was obtained by fraud and perjury. Should it be made to appear that the libel-

lant, knowing where the libellee resided, fraudulently caused the notice to be published in a paper not likely to be seen by her or her friends with the purpose of preventing the notice reaching her, and that the artifice was successful, the court ought not to hesitate to treat it as no notice at all, and no real compliance with the requisitions of the statute. The order of notice may have been complied with, but if fraudulently procured, with the very purpose of avoiding the giving of actual notice, it ought to be regarded as what it really is, no notice at all.

Upon the other point, that the divorce was obtained by fraud and perjury, it ought also to appear that the cause of divorce alleged had in fact no existence; but, as no definitive judgment is to be rendered, but only to determine how far testimony of this character is admissible, it is unnecessary to examine further the sufficiency of the offer. The great question is, whether, after this lapse of time, this decree can be set aside or vacated for fraud or imposition; and on that point we are clear that it may be if the proofs are clear.

These views must not be understood to give any countenance whatever to the idea that there may be a re-trial, merely, of a divorce suit on the allegation of fraud. On the contrary, the proof of fraud of a grave character ought to be clear; and the court would be slow to reverse a decree of divorce, when the libellee appeared, or had due and actual notice to appear, unless fraud of a serious character is established.

No objection is made in respect to the form of the application here, and we therefore assume that it is in writing, as it ought to be, setting forth fully the grounds of the application.

Case discharged.

Supreme Court of Iowa.

THE PEORIA AND ROCK ISLAND RAILWAY CO. *v.* ANDREW J. PRESTON, APPELLANT.

Where the charter of a corporation fixes the amount of its capital stock and the number of shares into which it shall be divided, the corporation cannot make assessments on the shares subscribed, for the purpose of carrying on the general business of the company, until all the capital stock has been subscribed, unless